CRIMINAL INSANITY ……..Revised July 2017

(Note: *see also* AZ Brief Revised Criminal Mental Competence; AZ Brief Revised Juvenile Mental Competence and Insanity)

TABLE OF CONTENTS

I. INSANITY DEFINITION

A.R.S. § 13-502(A) defines insanity as follows:

> A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong. A mental disease or defect constituting legal insanity is an affirmative defense. Mental disease or defect does not include disorders that result from acute voluntary intoxication or withdrawal from alcohol or drugs, character defects, psychosexual disorders or impulse control disorders. Conditions that do not constitute legal insanity include but are not limited to momentary, temporary conditions arising from the pressure of the circumstances, moral decadence, depravity or passion growing out of anger, jealousy, revenge, hatred or other motives in a person who does not suffer from a mental disease or defect or an abnormality that is manifested only by criminal conduct.

A. M'Naghten Test

The presumption of sanity means the State need not include as an element of every criminal charge an allegation that the defendant had the capacity to form the *mens rea* necessary for criminal responsibility. The legislative branch has considerable leeway in defining the presumption's strength through the kind of evidence and degree of persuasiveness necessary to overcome it. Insanity rules like M'Naghten are attempts to define or indicate the kinds of mental differences that overcome the presumption of sanity and thus excuse a defendant from customary criminal responsibility. *Clark v. Arizona*, 548 U.S. 735, 766-68 (2006).

The language of A.R.S. § 13-502 consists of a portion of the M'Naghten test for insanity. The complete M'Naghten test states that a person is not responsible for criminal conduct by reason of insanity if, at the time of the conduct, (1) the person was suffering from a mental disease or defect so as not to know the nature and quality of the

act, or (2) the person did not know that what he was doing was wrong. *State v. Roque*, 213 Ariz. 193, 214 ¶ 72 (2006). In 1993, the legislature modified Arizona's affirmative insanity defense to "guilty except insane." It removed the first part of the test inquiring into the person's cognitive capacity. What remains is the second part; namely, moral capacity, which requires a the defendant to show by clear and convincing evidence that at the time of the criminal act, he/she was afflicted with a mental disease or defect of such severity that he/she did not know the criminal act was wrong. *Clark v. Arizona*, 548 U.S. 735-747-48 (2006); see A.R.S. § 13-502 (A), (C).

Arizona's definition of insanity which encompasses only the second prong does not violate due process. *State v. Roque*, 213 Ariz. 193, 214 ¶ 72 (2006). Due process imposes no single canonical formulation of legal insanity. Arizona's previous statement of the M'Naghten rule, with its express alternative of cognitive incapacity, was constitutionally adequate. But the abbreviated rule is no less so, because cognitive incapacity is still relevant and evidence going to cognitive incapacity has the same significance under the short form as it had under the long. In practical terms, if a defendant did not know what he was doing when he acted, he could not have known that he was performing the wrongful act charged as a crime. *Clark v. Arizona*, 548 U.S. 735, 753-54 (2006).

Mental illness does not necessarily deprive one of responsibility for his acts. *State v. Fayle*, 134 Ariz. 565, 576 (App. 1982). In fact, evidence of a mental disorder short of insanity is inadmissible either as an affirmative defense or to negate the mental state of the defendant. *State v. Mott*, 187 Ariz. 536, 541 (1997). The mere existence of a mental disease or defect is not alone sufficient to support finding of guilty except insane;

rather, the mental disease or defect must be of such severity that person did not know the criminal act was wrong. *In re Natalie Z*., 214 Ariz. 452, 455-56, ¶ 8 (App. 2007)(juvenile court did not violate § 13-502(A) in acknowledging juvenile's bipolar disorder but concluding her assaultive behavior arose from other conditions that did not constitute legal insanity).

Nothing in § 13-502(A) suggests that persons afflicted with a mental disease or disorder must be deemed insane even where the offense was motivated by a condition that does not constitute legal insanity. The last clause of § 13-502(A) creates a catch-all exclusion for types of motivations found in those who are not legally insane. *In re Natalie Z*., 214 Ariz. 452, 456, ¶ 9 (App. 2007). The assessment of whether a defendant suffers from a mental disease or defect is merely a threshold determination which does not require the factfinder to find the defendant is insane. Rather, the factfinder must then determine whether such defect was so severe that it deprived the defendant of the ability to know the criminal act was wrong and whether – even if the defendant's moral judgment was impaired – that impairment arose from some other cause excluded as a basis for legal insanity. *Id*., ¶ 10. But conversely, neither does 13-502(A) require the defendant's mental defect be the sole cause of his or her behavior to support a verdict of guilty except insane. *Id*.at 457, ¶ 12, n. 3.

"Wrong," for purposes of insanity defense, should be defined by community standards of morality and not by the defendant's subjective belief. *State v. Tamplin*, 195 Ariz. 246, 248-49, ¶¶ 7-12 (App. 1999). A person's belief that his or her acts were not criminal, although others believed they were, does not establish an inability to determine right from wrong sufficient to meet the M'Naghten test. Rather, the person's belief that

others considered the acts criminal, while admitting his knowledge that the acts were crimes, indicates an ability to distinguish right from wrong. *State v. Berndt*, 138 Ariz. 41, 45 (1983)

Even if a person is declared legally insane, that fact does not preclude the person from being tried for a subsequent criminal act. Moreover, even one who has been judicially declared insane is criminally responsible for acts committed during a lucid interval. *Todd v. Melcher*, 11 Ariz. App. 157, 159-60 (1969).

B. Conditions that do not Constitute Legal Insanity.

1. Intoxication or Addiction

"Mental disease or defect" does not include disorders that result from acute voluntary intoxication or withdrawal from alcohol or drugs. A.R.S. § 13-502(A). *See also* A.R.S. § 13-503, providing: "Temporary intoxication resulting from the voluntary ingestion, consumption, inhalation or injection of alcohol, an illegal substance under Chapter 34 of this title or other psychoactive substances or the abuse of prescribed medications does not constitute insanity and is not a defense for any criminal act or requisite state of mind." Thus, an indication that drug and alcohol use may have caused some blackouts does not constitute an insanity defense. *State v. Schurz*, 176 Ariz. 46, 54 (1993). Further, the insanity defense is not available to a defendant whose voluntary use of intoxicating alcohol and/or drugs aggravates a pre-existing mental disorder or creates a temporary episode of mental incapacity. *State v. Hudson*, 152 Ariz. 121, 126 (1986).

2. Diminished Capacity

"Mental disease or defect" does not include disorders that result from character defects, psychosexual disorders or impulse control disorders. Conditions that do not constitute legal insanity include but are not limited to momentary, temporary conditions arising from the pressure of the circumstances, moral decadence, depravity or passion growing out of anger, jealousy, revenge, hatred or other motives in a person who does not suffer from a mental disease or defect or an abnormality that is manifested only by criminal conduct. A.R.S. § 13-502(A). Arizona's insanity statute, A.R.S. § 13–502(A), expressly provides that an "impulse control disorder" does not constitute a mental disease or defect sufficient to sustain an insanity finding. Thus, a defendant charged with second-degree murder may not offer evidence that due to a character trait of impulsivity, he did not act knowingly or recklessly because he lacked the power to control his actions. *State v. Buot*, 232 Ariz. 432, 436, ¶¶ 19-20 (App. 2013). *See also Leland v. State of Oregon*, 343 U.S. 790, 801 (1952) (due process does not require a state to allow a defendant to disprove guilt by showing an "irresistible impulse" to commit the criminal act).

The minimum for criminal liability is conduct which includes a voluntary act or the omission to perform a duty imposed by law which the person is physically capable of performing. A.R.S. § 13-201. *See also*, "Culpable mental state," defined in A.R.S. § 13-105(10). Courts have referred to the use of expert psychiatric evidence to negate *mens rea* as a "diminished capacity" defense." Such evidence is distinguishable from an affirmative defense that excuses, mitigates, or lessens a defendant's moral culpability due to his psychological impairment. Because the Arizona legislature has not provided

for a diminished capacity defense, the courts have consistently refused to allow psychiatric testimony to negate specific intent. Consequently, Arizona does not allow evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the *mens rea* element of a crime. *State v. Mott*, 187 Ariz. 536, 540-41 (1997). *See also State v. Leteve*, 237 Ariz. 516, ¶ 20 (2015); *State v. Millis*, 2017 WL 943895, --Ariz.-- (App. Mar. 9, 2017)(trial court properly precluded as inadmissible diminished capacity evidence expert testimony about ASD proffered for the purpose of establishing a lesser mens rea that would allow the jury to convict defendant charged with intentional/knowing child abuse and felony murder of reckless or negligent child abuse and acquit him of felony murder); *State v. Lopez*, 234 Ariz. 465, 469 ¶ 21(App. 2014); *State v. Buot*, 232 Ariz. 432, 436, ¶ 20 (App. 2013).

Thus, in Arizona, evidence of mental disease and incapacity may be introduced and considered, and if sufficient to satisfy the defendant's burden of proof it will displace the presumption of sanity and excuse the defendant from criminal responsibility. But mental disease and capacity evidence may be considered only for its bearing on the insanity defense – not for whatever a factfinder might think it is worth on the issue of *mens rea*. Arizona's *Mott* rule reflects a choice to avoid a second avenue for exploring capacity and confine the consideration of evidence of mental disease and incapacity to the insanity defense. If a jury were free to decide how much evidence of mental disease and incapacity was enough to counter evidence of *mens rea* to the point of creating a reasonable doubt, that would in functional terms be analogous to allowing jurors to decide upon some degree of diminished capacity to obey the law, a degree set by them, that would prevail as a stand-alone defense. *Clark v. Arizona*, 548 U.S. 735, 771-73

(2006). *See also State v. Millis*, 2017 WL 943895, --Ariz.--, ¶ 15 (App. Mar. 9, 2017)(legislature declined to adopt a diminished capacity defense when given the opportunity and instead confined "any consideration of characteristic behavior associated with mental disease" to its bearing on an insanity defense).

- *But see* Observation Evidence, *infra*.

i. Diminished Capacity in Capital Sentencing

The legislature only intended to preclude evidence of diminished capacity when a defendant attempts to use it to negate his or her responsibility for a crime in the guilt/innocence phase of the trial. However, nothing about the statute or case law precludes diminished capacity evidence from being presented in the aggravation phase of sentencing when a defendant already has been found criminally responsible. *State v. Johnson*, 229 Ariz. 475, 480, ¶¶ 13-15(App. 2012).

ii. Observation Evidence

Arizona does not allow evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the *mens rea* element of a crime. But a defendant may offer evidence about his behavioral tendencies to show that he possessed a character trait of acting reflexively in response to stress. Such evidence is termed "observation evidence." *State v. Leteve*, 237 Ariz. 516, ¶¶ 20-21 (2015), *citing Clark v. Arizona*, 548 U.S. 735, 757 (2006).

In *Clark v. Arizona*, the United States Supreme Court defined and distinguished observation evidence from both mental disease and capacity evidence under *State v. Mott*, 187 Ariz. 536 (1997). First, there is "observation evidence" in the everyday sense, testimony from those who observed what the defendant did and heard what he said; this

category would also include testimony that an expert witness might give about the defendant's tendency to think in a certain way and his behavioral characteristics. This evidence may support a professional diagnosis of mental disease and in any event is the kind of evidence that can be relevant to show what in fact was on the defendant's mind when he acted. Observation evidence can be presented by either lay or expert witnesses*. Clark*, 548 U.S. at 757-58.

Second, "mental disease" evidence consists of opinion testimony, typically from an expert, that the defendant suffered from a mental disease with features described by the witness. Third, “capacity evidence” is opinion testimony concerning the defendant's capacity for cognition and moral judgment (and ultimately also his capacity to form *mens rea*), typically from the same expert who testified about mental disease but focused on those specific details of the mental condition that make the difference between sanity and insanity under the Arizona definition. Under *Mott*, both mental disease and capacity evidence are prohibited for the purpose of negating *mens rea*. *Clark*, 548 U.S. at 758–59.

But *Mott* imposed no restriction on considering observation evidence; rather, the *Mott* restriction applies only to expert opinion regarding mental-disease evidence (whether at the time of the crime a defendant suffered from a mental disease or defect) and capacity evidence (whether the disease or defect left him incapable of performing or experiencing a mental process defined as necessary for sanity). *Mott* was careful to distinguish this kind of opinion evidence from observation evidence generally and even from observation evidence that an expert witness might offer, such as descriptions of a defendant's tendency to think in a certain way or his behavioral characteristics, and

made it clear this sort of testimony was admissible to rebut the prosecution's evidence of *mens rea*. Thus, only opinion testimony going to mental defect or disease and its effect on the cognitive or moral capacities on which sanity depends under the Arizona rule, is restricted. *Clark,* 548 U.S. at 760. *See also State v. Millis*, 2017 WL 943895, --Ariz.--, ¶ 18 (App. Mar. 9, 2017)(refusing to consider observation evidence argument on appeal where defendant did not clearly present argument to trial court, failed to cite *Clark*, and only offer of proof specifically concerned expert opinion of mental disorder).

However, the Court provided the caveat that what it could say about these categories goes to their cores, not their margins; exact limits have not been worked out in any Arizona law. "Necessarily, then, our own decision can address only core issues, leaving for other cases any due process claims that may be raised about the treatment of evidence whose categorization is subject to dispute." *Clark*, 548 U.S. at 759. Thus far observation evidence has been held admissible only on the issue of premeditation in first degree murder cases, in accordance with *State v. Christensen*, 129 Ariz. 32, 35 (1981)(character trait of acting without reflection may tend to establish defendant acted impulsively, from which jury could conclude he did not premeditate the homicide) as approved by *Mott*, 187 Ariz. at 543-44 ("The proffered testimony [in *Christensen*] was not that [the defendant] was *incapable,* by reason of a mental defect, of premeditating or deliberating but that, because he had a tendency to act impulsively, he did not premeditate the homicide.").

It is error to exclude or restrict observation evidence on the issue of premedication in a first degree murder trial. *State v. Leteve*, 237 Ariz. 516, ¶¶ 22-24 (2015). In *Leteve*, the trial court prohibited testimony from an expert about his

observations of the defendant's character trait for impulsivity, reasoning that since the expert had only interviewed the defendant after the murders his testimony would be relevant only to a diminished capacity defense. The court allowed the defendant's parents to testify about their observations, but only regarding events occurring the night before and the day of the murders. The Arizona Supreme Court held these temporal restrictions were erroneous because a defendant who can show he has a character trait for acting without reflection presents a fact that makes it more likely he acted impulsively at the time of the murders. *Id*., ¶ 23, *citing State v. Christensen*, 129 Ariz. 32, 35 (1981). Since the expert would have testified that the defendant had a general character trait for impulsivity, and not that he acted impulsively at the time of the murders, the trial court erred by excluding the testimony merely because the expert's observations were not contemporaneous with the crime. Likewise, the trial court erred by placing temporal restrictions on the observation testimony of the defendant's parents. *Id*. at ¶ 24.

However, this is limited to "cases involving evidence offered to rebut *premeditation*." *State v. Lopez*, 234 Ariz. 465, 469, ¶ 22 (App. 2014), *emphasis in original, citing State v. Christensen*, 129 Ariz. 32, 34-35 (1981); *see also State v. Millis*, 2017 WL 943895, --Ariz.--, ¶ 19 (App. Mar. 9, 2017)(expert testimony on character trait of impulsivity is admissible to rebut premeditation only in first-degree premeditated murder, not felony murder). In *State v. Buot*, 232 Ariz. 432, 435-36, ¶¶ 17-20 (App. 2013), the Court held the trial court erroneously allowed, under *Clark*, *Mott*, and *Christensen*, observation evidence about a character trait for impulsivity in a second degree murder trial. The Court noted "we do not understand *Christensen* to require a

court to admit character trait evidence of impulsivity to prove a defendant did not act knowingly or recklessly," *id*. at 436, ¶ 18, and concluded: "In sum, under the applicable Arizona statutes and case authorities, a defendant charged with second-degree murder may not offer evidence that due to a character trait of impulsivity, he did not act knowingly or recklessly because he lacked the power to control his actions." *Id*., ¶ 20.

Observation evidence may also be excluded when it is not sufficiently linked to the *mens rea* of the charged offense. *State v. Wright,* 214 Ariz. 540, 545, ¶ 16 (App. 2007). In *Wright*, the defendant was charged with controlling another person's means of transportation either knowing or having reason to know that the property was stolen, or with intent to permanently deprive the person of the means of transportation. His offer of proof on the issue of his mental state consisted of an expert report stating that, in the expert's opinion, he had borderline to low average intelligence and suffered from attention-deficit/hyperactivity disorder, a learning disorder, and an anxiety disorder. The Court held this offer of proof did not connect any of these diagnoses to whether or not Wright knew or should have known the vehicle was stolen or intended to permanently deprive the victim of the vehicle, and he thus failed to link the evidence to the behavioral characteristics relevant to the required mental state. *Id*.

II. AFFIRMATIVE DEFENSE

A mental disease or defect constituting legal insanity is an affirmative defense. A.R.S. § 502(A). Recognizing insanity as an affirmative defense does not negate the State's burden of proof; the State is still required to prove every element beyond a reasonable doubt. Because the insanity defense does not require the defendant to prove or to disprove any element of the offense charged, there is no change in the

presumption of innocence. On the contrary, regardless of whether the defendant is able to prove insanity, an acquittal will result if the State fails to meet its burden. *State v. Hurles*, 185 Ariz. 199, 203 (1996).

The defendant must prove legal insanity by clear and convincing evidence. A.R.S. § 13-502(C). "Clear and convincing" is defined as "highly probable." This is a lesser standard of proof than beyond a reasonable doubt. *State v. Roque*, 213 Ariz. 193, 214-15, ¶ 73 (2006). Placing the burden on a defendant to prove insanity by clear and convincing evidence, as required by A.R.S. § 13–502(C), does not violate due process. The United Supreme Court has upheld imposing on a defendant the burden of proving insanity beyond a reasonable doubt. *Leland v. Oregon*, 343 U.S. 790, 798 (1952). If the requirement of proof beyond a reasonable doubt is not unconstitutionally high, neither is the requirement that a defendant prove insanity by clear and convincing evidence. *State v. Roque,* 213 Ariz. 193, 215, ¶ 77 (2006).

A. Rejection of Insanity Defense

The trial court must defer to the wishes of a defendant who voluntarily and intelligently rejects presentation of the insanity defense. *State v. Fayle*, 134 Ariz. 565, 576 (App. 1982). A defendant, if competent to waive constitutional rights, may have strategic reasons for rejecting an insanity defense even though such a defense might be successful. For example, the insanity defense may disparage and deny the defendant's motive in committing the crime; a defendant has the right to have the jury consider his or her story, no matter how bizarre. Mental illness does not necessarily deprive one of responsibility for one's acts. Moreover, a defendant may prefer incarceration in the state prison for a definite term rather than an indefinite commitment to the state hospital

which would follow a “not guilty by reason of insanity” verdict. Other reasons may include: the quality of treatment received in a mental institution; the desire to avoid the stigma of an adjudication of insanity; the desire to avoid a “compromise” verdict; and the defendant's personal opposition to psychiatric treatment. *Id*.

III. PROCEDURE

A. Request for Examination

Under Rule 11.2(a), Ariz. R. Crim. P., any time after a crime is charged, any party or the court on its own motion may request that the defendant be examined to investigate the defendant’s mental condition at the time of the offense; the motion must be in writing and state the facts upon which the mental examination is sought. On motion of or with consent of the defendant, the court may order a screening examination for a guilty except insane plea pursuant to A.R.S. § 13-502 to be conducted by the mental health expert.

B. Appointment of Experts

A.R.S. § 13-4505, entitled “Appointment of experts; costs,” sets forth the basic framework for competency evaluations. Rule 11.3(a), Ariz. R. Crim. P. contains the same general framework as the statute. *State v. Bunton*, 230 Ariz. 51, 53, ¶ 7 (App. 2012). *See* AZ Brief Revised, Criminal Mental Competency, pp. 15-20.)

When a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (denial of assistance of psychiatrist on issue of

sanity at time of offense deprived defendant of due process). See also *McWillams v. Dunn,* __ U.S. __ (June 19, 2017)(indigent defendant whose mental health will be a significant factor at trial must receive the assistance of a psychiatric expert who is sufficiently available to the defense and independent from the prosecution to effectively assist in the evaluation, preparation, and presentation of the defense). However, there must be a reasoned basis for determining the insanity defense is viable based on a showing that the defendant's mental condition at the time of the offense is seriously in question. “A defendant's mental condition is not necessarily at issue in every criminal proceeding, however, and it is unlikely that psychiatric assistance of the kind we have described would be of probable value in cases where it is not.” *Ake*, 470 U.S. at 82.

Rule 11.3(f)(1) provides that if the defendant raises the insanity defense pursuant to A.R.S. § 13-502, on request of the court or any party, with the consent of the defendant, and if the offense involves death or serious physical injury and a reasonable basis exists to support the plea, the mental health expert who is appointed to determine competency pursuant to A.R.S. § 13-4505 must provide a screening report that includes the provisions of A.R.S. § 13-4506.

A.R.S. § 13-4506 provides as follows. On request of the court or any party, with the consent of the defendant and after a determination that a reasonable basis exists to support the plea of insanity, the mental health expert who is appointed pursuant to § 13-4505 to determine competency must provide a screening report that includes: (1) the mental status of the defendant at the time of the offense; and (2) if the expert determines that the defendant suffered from a mental disease, defect or disability at the time of the offense, the relationship of the disease, defect or disability to the offense.

A.R.S. § 13-4506(A). If the defendant's state of mind at the time of the offense will be included in the examination, the court may not appoint the expert to address this issue until it receives the defendant's medical and criminal history records. A.R.S. § 13-4506(B); *see also* Rule 11.3(f)(2). Within 10 working days after the expert is appointed, the parties must provide any additional medical or criminal history records requested by the court or the expert. A.R.S. § 13-4506(C); *see also* Rule 11.3(f)(3).

The court may in its discretion appoint additional experts. Rule 11.3(g). The Comment to Rule 11.3 notes that with respect to sections (f) and (g), the mental health expert may desire the assistance of other experts to carry out physical, neurological or psychological tests. This section authorizes the court to appoint additional experts, and to order the defendant to undergo further examinations and tests. The reports of these experts should include the required summary and be attached to the mental health expert's report.

The M'Naghten test for insanity is a legal, not medical test. Although a testifying psychiatrist need not be a forensic specialist, the psychiatrist must be thoroughly familiar with the legal ramifications of the test. *State v. Edwards*, 139 Ariz. 217, 220 (App. 1983).

C. Commitment Pending Evaluation

A.R.S. § 13-502(B) provides that in a case involving the death or serious physical injury of or the threat of death or serious physical injury to another person, if a plea of insanity is made and the court determines a reasonable basis exists to support the plea, the court may commit the defendant to a secure state mental health facility under the department of health services, a secure county mental health evaluation and treatment

facility, or another secure licensed mental health facility for up to 30 days for mental health evaluation and treatment. (*See* Death and Serious Injury, *infra*, pp. 23-240.) The defendant must be observed and evaluated by experts at the mental health facility who are licensed pursuant to title 32, familiar with this state's insanity statutes, are specialists in mental diseases and defects, and are knowledgeable concerning insanity. The expert or experts who examine the defendant must submit a written report of the evaluation to the court, the defendant's attorney and the prosecutor. The defendant pays the costs of the mental health facility to the clerk of court and the clerk transmits the reimbursements to the mental health facility, unless the defendant is indigent in which case the county reimburses the mental health facility.

D. Evaluation with No Commitment

A.R.S. § 13-502(B) further provides that if the court does not commit the defendant to a secure state mental health facility, the court must appoint an independent expert who is licensed pursuant to title 32, familiar with this state's insanity statutes, a specialist in mental diseases and defects, and knowledgeable concerning insanity to observe and evaluate the defendant. The expert must submit a written report of the evaluation to the court, defense counsel, and the prosecutor. The defendant pays the costs of the services of the independent expert to the clerk of court and the clerk transmits the reimbursements to the expert, unless the defendant is indigent in which case the county must reimburse the expert.

E. Additional Experts

A.R.S. § 13-502(B) concludes: "This subsection does not prohibit the defendant or this state from obtaining additional psychiatric examinations by other mental health

experts who are licensed pursuant to title 32, familiar with this state's insanity statutes, specialists in mental diseases and defects, and knowledgeable concerning insanity." A.R.S. § 13-3993(A) provides that if a defendant declares intent to invoke an insanity defense, on a showing of unequal resources the State has the right to nominate and have appointed to examine the defendant the same number of medical doctors and licensed psychologists that will testify on behalf of the defense; A.R.S. § 13-3993(B) further provides that if a defendant refuses to be examined by the State's mental health experts, the court must preclude the defendant from offering expert evidence of mental state at the time of the crime.

However, the power to make procedural rules is vested exclusively in the Supreme Court; since the State's right to appointment of a mental health expert is procedural in nature, it is governed by Rule 11.2, rather than by subsequently enacted A.R.S. § 13-3993. Therefore, it is not necessary for the defendant to raise an insanity defense or for the State to have presented new evidence of defendant's incompetency in order for the State to be entitled to the appointment of a mental health expert to examine the defendant. *State v. Druke*, 143 Ariz. 314, 317-18 (App. 1984) (state entitled to appointment of expert to rebut defense expert observation evidence negating premeditation in first-degree murder case).

A defendant who places his or her mental condition in issue and gives notice of intention to rely on psychiatric testimony has “opened the door” to an examination by an expert appointed on motion of the State. A defendant may be compelled to submit to a psychiatric exam when he or she raises the defense of insanity. *State v. Shackart*, 175 Ariz. 494, 500 (1993). A defendant offering expert mental health testimony must either

submit to a state examination or forego introducing his evidence. The State's examination need not mirror that of the defense; rather, the State is entitled to a meaningful opportunity to rebut the defendant's expert testimony. *State v. Cota*, 229 Ariz. 136, 146, ¶ 37 (2012)(court did not err in ordering defendant to submit to MMPI requested by State's expert); *State v. Grell*, 212 Ariz. 516, 527-28, ¶¶ 51-53 (2006)(in hearing on capital defendant's alleged mental retardation, trial court's exclusion of testimony of third mental health expert on defendant's adaptive abilities as sanction for defendant's refusal to cooperate with State's third mental health expert, was not abuse of discretion in light of State's reduced ability to rebut assessment of defendant's current functioning). *But see State v. Williams*, 154 Ariz. 366, 369-70 (1987) (defense expert allowed to testify even though defendant was uncooperative and evasive with State's appointed expert because his behavior provided support for diagnosis of malingering to avoid criminal prosecution and, aided by collateral sources, the State's expert was able to reach a conclusion about defendant's ability to tell right from wrong at time of offense).

F. No Privileged Communications

The privilege of confidential communications between a medical doctor or licensed psychologist and the defendant as it relates to the defendant's mental state at the time of the alleged crime does not apply if any mental disability defense is raised. A.R.S. § 13-3993(C). If any mental disability defense is raised, both the State and the defendant must receive before trial complete copies of any report by a doctor or psychologist who examines the defendant to determine the defendant's mental state at the time of the offense or the defendant's competency. A.R.S. § 13-3993(D).

This statute does not address a defendant's Fifth Amendment privilege against self-incrimination; that constitutional privilege is embodied in Criminal Rule 11.7 (providing that a defendant's statement during mental examinations cannot be admitted during trial on guilt without his or her consent). But a defendant can consent to the use of his or her statements by calling a doctor to prove insanity; a defendant may not use privilege as both a shield and a sword. A waiver can be implied when a party injects a matter that, in the context of the case, creates such a need for the opponent to obtain the information allegedly protected by the privilege that it would be unfair to allow that party to assert the privilege. *State v. Fitzgerald*, 232 Ariz. 208, 217, ¶ 44 (2013), *State v. Wilson*, 200 Ariz. 390, 396, ¶ 16 (App. 201), *State v. Tallabas*, 155 Ariz. 321 (App. 1987).

The Fifth Amendment applies to statements made by a defendant during a court-ordered mental health examination. A defendant is not required to disclose statements made during a court-ordered exam, and such statements are not admissible at trial. But when a defendant asserts an insanity defense, he waives his self-incrimination privilege. Such waiver is analogous to the rule that a defendant who chooses to testify at trial may not invoke his Fifth Amendment privilege to avoid cross-examination. Additionally, fairness requires the State have access to a defendant's statements to rebut the evidence of insanity presented by the defendant. *Hon. Hegyi v. Rasmussen,* 2017 WL 2883858, ¶¶ 9-10 (July 7, 2017). In such cases, a defendant’s statements to the examiner are not compelled; thus, because the Fifth Amendment only applies to compelled statements, the privilege is not implicated. Consistent with these principles, Arizona’s rules and statutes governing mental health exams preserve a defendant’s

privilege against self-incrimination. Rule11.7 is grounded in the Fifth Amendment and provides that, absent waiver, a defendant's statements to a mental health expert are not admissible at trial. Similarly, A.R.S. § 13-4508(A) provides that "[t]he privilege against self-incrimination applies to any [mental health] examination that is ordered by the court pursuant to this chapter." *Id*. at ¶¶ 11-12.

Arizona's rules and statutes also provide that a defendant may waive his self-incrimination privilege if he asserts an insanity defense; Rule 11.7(a) prohibits admission of a defendant's statements "unless the defendant presents evidence intended to rebut the presumption of sanity." Similarly, Rule 11.7(b)(1) provides that a defendant's statements about the pending charges are not admissible "without his [ ] consent." Finally, Rule 11.4 addresses disclosure of a defendant's statements made during court-ordered and noncompulsory exams. Compare Rule 11.4(a) (referring to "Reports of Appointed Experts"), with Rule 11.4(b) (referring to "Reports of Other Experts"). Under Rule 11.4(a), when a defendant undergoes a court-ordered exam, his statements to the examiner "shall be made available only to the defendant." In contrast, Rule 11.4(b), which applies to noncompulsory exams, provides that each party "shall make available to the opposite party . . . all written reports or statements made by them in connection with the particular case." *Hon. Hegyi v. Rasmussen,* 2017 WL 2883858, ¶¶ 13-14 (July 7, 2017).

Therefore, under Criminal Rule 11.4(b), a defendant who asserts an insanity defense and voluntarily undergoes a mental health exam must disclose a complete copy of the expert's examination report, including any statements made by the defendant concerning the charges against him; however, such statements are

admissible only to rebut insanity and not to prove guilt. Although there may be overlap between statements about the offense and those relevant to the insanity defense, nonetheless, the trial court must ensure that the State's use of statements is closely tailored to rebutting the insanity defense. *Hon. Hegyi v. Rasmussen,* 2017 WL 2883858, ¶¶ 19-20 (July 7, 2017), disapproving the holding in *Austin v. Alfred*, 163 Ariz. 397 (App. 1990) to the extent it permits a defendant to redact such statements under Rule 11.4(b).

G. Detention and Restoration of Sanity

A defendant who is charged with a crime and committed to the state hospital because he is insane or mentally defective to the extent of being unable to understand the proceedings or assist in his defense, or committed because he is found insane after conviction but before sentencing, must be detained in the state hospital until he becomes sane. When the defendant becomes sane, the superintendent of the state hospital must notify the local sheriff and county attorney. The sheriff must then without delay bring the defendant from the state hospital and place him in proper custody, until he is brought to trial or sentenced or is legally discharged. A.R.S. § 13-3991. When a defendant is committed to the state hospital before sentence is pronounced, the expenses of transporting him to and from the hospital and of maintaining him while confined there is charged against the county in which the defendant was charged; however, the county may recover such expenses from the estate of the defendant or from a relative, town, city or county required by law to provide for and maintain the defendant. A.R.S. § 13-3992.

H. Limited jurisdiction Courts

When a doubt arises as to the sanity of the defendant during the pendency of a criminal action in a limited jurisdiction court, that court must certify the proceedings to the superior court. The criminal prosecution is not ended but merely suspended; in order for it to be concluded, the question of sanity must be determined by the superior court. Comment to Rule 11.2, *citing Wissner v. State*, 21 Ariz.App. 432 (1974), cited with approval in *City of Phoenix v. Superior Court*, 139 Ariz. 180 (1984).

IV. GUILTY EXCEPT INSANE VERDICT

Under Rule 23.2(b), Ariz. R. Crim. P., when the jury determines that a defendant is guilty except insane, the verdict shall so state. Where a defendant's sanity is at issue, Rule 23.2(b) mandates that a form of verdict of not guilty by reason of insanity be submitted to the jury. Failure to include this form of verdict with the other forms of verdicts is reversible error, especially if followed by an incomplete instruction as to the duty of the jury if they found the defendant insane. Such insufficiencies effectively deny the defendant an insanity defense. *State v. Sanchez*, 135 Ariz. 123, 124-25 (1983).

V. GUILTY EXCEPT INSANE SENTENCING

A.R.S. § 13-502(D) provides that if the defendant is found guilty except insane, the court must then determine the sentence the defendant could have received under the following statutes had the defendant not been found insane: § 13-707(A)(misdemeanors), § 13-751(A)(death or life imprisonment), or the presumptive sentence the defendant could have received under § 13-702(A)(first time felony offenders), § 13-703(A)(repetitive offenders), § 13-704(A)(dangerous offenders), § 13-

705(A)(dangerous crimes against children), § 13-706(A)(serious, violent or aggravated offenders), § 13-710(second degree murder) or § 13-1406(sexual assault).

A.R.S. § 13-502(D) further directs the court to sentence the defendant to a term of imprisonment and order that he be placed under the jurisdiction of the psychiatric security review board and committed to a state mental health facility pursuant to § 13-3994 for that term. In making this determination the court may not consider sentence enhancements for prior convictions under § 13-703 or 13-704. The court must expressly identify each act the defendant committed and separately find whether each act involved the death or physical injury of or a substantial threat of death or physical injury to another person. (*See* Death and Serious Injury; A.R.S. § 13-3994(D), *infra*, pp. 23-24.) The trial court has inherent authority to impose consecutive sentences of commitment. *State v. Ward*, 200 Ariz. 387, 389, ¶ 9 (App. 2001) (trial court properly committed defendant to ASH for a 15-year term that was the equivalent of two consecutive terms of 7.5 years).

Rule 25, Ariz. R. Crim. P., provides that if a defendant is found not guilty by reason of insanity or guilty except insane pursuant to A.R.S. § 13-502, the court must commit the defendant to a secure mental health facility in accordance with A.R.S. § 13-3994. A.R.S. § 13-3994 provides as follows. A person who is found guilty except insane pursuant to § 13-502 must be committed to a secure state mental health facility under the department of health services for a period of treatment. A.R.S. § 13-3994(A). "State mental health facility" means a secure state mental health facility under the department of health services. A.R.S. § 13-3994(R).

A.R.S. 13-3994(Q) provides that if a person is found guilty except insane pursuant to § 13-502, the department of health services must assume custody of the person within 10 days after receiving the order committing the person pursuant to § 13-3994(A). The Arizona State Hospital (ASH) must collect census data for guilty except insane treatment programs to establish maximum capacity and the allocation formula required under § 36-206(D). If ASH reaches its funded capacity for forensic programs, the department of health services may defer the admission of the person found guilty except insane for up to an additional 20 days. The department must reimburse the county for the actual costs of each day the admission is deferred. If the department is not able to admit the person found guilty except insane at the conclusion of the deferral period, it must notify the sentencing court, the prosecutor and defense counsel. On receipt of such notification, the prosecutor or defense counsel may request a hearing to determine the likely length of time admission will continue to be deferred and whether any other action should be taken. The court must set a hearing within 10 days.

A. No Death or Serious Physical Injury

If the crime did not cause death or serious physical injury or the threat of death or serious physical injury, the court must set a hearing date within 75 days after the commitment to determine if the person is entitled to release from confinement or if the person meets the standards for civil commitment. The court must notify the medical director of the mental health facility, the attorney general, the county attorney, the victim, and the attorney representing the person, if any, of the date of the hearing. The director of the facility must submit a report addressing the person's mental health and dangerousness 14 days before the hearing. A.R.S. § 13-3994(B).

At such hearing, if the person proves by clear and convincing evidence that he no longer suffers from a mental disease or defect and is not dangerous, the court must order the person's release and the person's commitment ordered pursuant to § 13-502(D) is terminated. Before deciding to release a person, the court must consider his entire criminal history and may not order release if it determines he has a propensity to reoffend. A.R.S. § 13-3994(C)(1). If the court finds the person still suffers from a mental disease or defect, may present a threat of danger to self or others, has a grave, persistent or acute disability or has a propensity to reoffend, it must order the county attorney to institute civil commitment proceedings and the person's commitment ordered pursuant to § 13-502(D) is terminated. A.R.S. § 13-3994(C)(2).

B. Death or Serious Physical Injury

A.R.S. § 13-502(D) requires the court to expressly identify each act the defendant committed and separately find whether each act involved the death or physical injury of or a substantial threat of death or physical injury to another person. Whether an act involves death or physical injury or a substantial threat of death or physical injury is not limited to conduct that involves a substantial "actual" threat of death or physical injury. That phrase, properly construed, also includes conduct that involves a substantial "apparent" threat of death or physical injury. This construction reflects legislative intent by harmonizing § 13-502(D) with those statutes criminalizing both kinds of conduct, such as armed robbery, A.R.S. § 13-1904; first-degree burglary, A.R.S. § 13-1508; and aggravated assault, A.R.S. § 13-1204. If a defendant commits one of these offenses while armed with a deadly weapon, it matters not whether the weapon posed an actual or apparent threat to the victim. The definition of "deadly

weapon" under A.R.S. § 13-105(13) "includes a firearm," and § 13-105(17) defines "firearm" as "any loaded or unloaded handgun, pistol, revolver, [or] shotgun." A limited construction of § 13–502(D) would result in the exclusion of such offenses and lead to an absurd result. *State v. Flynt*, 199 Ariz. 92, 95-96, ¶ 10 (App. 2000)(pointing an unloaded gun at another person involved "substantial threat of death or physical injury" in determining defendant's sentence after he was found guilty except insane, warranting 10.5- year commitment).

Under A.R.S. § 13-3994(D), if the court finds the offense caused death or serious physical injury or the threat of death or serious physical injury, the court must place the person under the jurisdiction of the psychiatric security review board (Board). The court must state the beginning date, length, and ending date of the Board's jurisdiction. The length of the Board's jurisdiction is equal to the sentence the person could have received under § 13-707(A)(misdemeanors), § 13-751(A)(death or life imprisonment), or the presumptive sentence the defendant could have received under § 13-702(D)(first time felony offenders), § 13-703(A)(repetitive offenders), § 13-704(A)(dangerous offenders), § 13-705(A)(dangerous crimes against children), § 13-706(A)(serious, violent or aggravated offenders), § 13-710(second degree murder) or § 13-1406(sexual assault). In making this determination the court may not consider sentence enhancements for prior convictions under § 13-703 or 13-704. The court retains jurisdiction of all matters that are not specifically delegated to the Board for the duration of the presumptive sentence. *See also* § 13-502(D).

A person placed under the Board's jurisdiction pursuant to § 13-3994(D) is not eligible for discharge until such jurisdiction expires. A.R.S. § 13-3994(E). Under A.R.S.

§ 13-3994(F), a person under the Board's jurisdiction pursuant to § 13-3994(D) is not entitled to a hearing before the Board earlier than 120 days after initial commitment; a request for a subsequent release hearing may be made under subsection H. After the hearing, the Board may take one of the following actions:

> 1. If the Board finds the person still suffers from a mental disease or defect and is dangerous, it must order that the person remain committed at the secure state mental health facility.
>
> 2. If the person proves by clear and convincing evidence that he no longer suffers from a mental disease or defect and is not dangerous, the Board must order the person's release. The person remains under the Board's jurisdiction. Before determining to release a person, the Board must consider his entire criminal history and may not order the person's release if it determines he has a propensity to reoffend.
>
> 3. If the Board finds the person still suffers from a mental disease or defect or that the mental disease or defect is in stable remission but the person is no longer dangerous, it must order the person's conditional release. The person remains under the Board's jurisdiction. The Board in conjunction with the state mental health facility and behavioral health community providers must specify the conditions of the person's release. The Board must continue to monitor and supervise a person who is released conditionally. Before the conditional release of a person, a supervised treatment plan must be in place, including the necessary funding to implement the plan.
>
> 4. If the person is sentenced pursuant to § 13-704(A)(dangerous offenders), § 13-710(A)(second degree murder) or § 13-751(A)(death or life imprisonment), and the Board finds the person no longer needs ongoing treatment for a mental disease and the person is dangerous or has a propensity to reoffend, it must order the person to be transferred to DOC for the remainder of the sentence imposed under § 13-502(D). The Bard must consider the safety and protection of the public.

Public defenders do not represent patients committed to state mental health facilities in Board hearings held under. § 13-3994. Like parole release hearings, the purpose of the hearing is to assist the board in gathering information to determine if the defendant can safely return to society. The public defender is not required to provide

representation for defendants at parole release hearings; parole supervision is not directly by the court but by an administrative agency. Likewise, supervision of defendants adjudicated guilty except insane is not by the court system, but rather by the state psychiatric board. *Coconino County Pub. Defender v. Adams*, 184 Ariz. 273, 275-76 (App. 1995).

After the Board orders a person to be transferred to DOC, the person may file a petition for a judicial determination. The person must do so within 20 days and serve a copy on the attorney general, and must remain in a state mental health facility pending the result. The person has the burden of proving the issues by clear and convincing evidence. The judicial determination is limited to (1) whether the person no longer needs ongoing treatment for a mental disease; and (2) whether the person is dangerous or has a propensity to reoffend. A.R.S. § 13-3994(G).

A person under the Board's jurisdiction may not seek a new release hearing sooner than 20 months after a prior release hearing, except the medical director of the state mental health facility may request a new release hearing at any time. The person may not be held in confinement for more than two years without a hearing before the Board to determine if the person should be released or conditionally released. A.R.S. § 13-3994(H). At any hearing for release or conditional release: (1) public safety and protection are primary; and (2) the applicant has the burden of proof by clear and convincing evidence. A.R.S. § 13-3994(I).

At least 15 days before a hearing to consider a person's release, or before the expiration of the Board's jurisdiction over the person, the state mental health facility or supervising agency must submit to the Board a report on the person's mental health.

The Board must determine whether to release the person or to order the county attorney to institute civil commitment proceedings. A.R.S. § 13-3994(J). The procedures for civil commitment govern the continued commitment of the person after the Board's jurisdiction expires. A.R.S. § 13-3994(K). Before a person is released or conditionally released, at least 3 of the 5 Board members must vote for release or conditional release. A.R.S. § 13-3994(L).

If at any time it appears to the Board or its chairman or vice-chairman or the medical director of the state mental health facility that the person has failed to comply with the terms of conditional release or that the mental health of the person has deteriorated, the Board or its chairman or vice-chairman for good cause or the medical director of the state mental health facility may order that the person be returned to a secure state mental health facility for evaluation or treatment. A written order of the Board or its chairman or vice-chairman or the medical director is sufficient warrant for any law enforcement officer to take the person into custody and to transport the person accordingly. The law enforcement officer must execute the order and immediately notify the Board of the person's return to the facility. The Board must conduct a hearing within 20 days after the person's return to a secure state mental health facility, and give notice within 5 days before the hearing to the person, the victim, the attorney representing the person, the county attorney and the attorney general. A.R.S. § 13-3994(M).

The director of a facility providing treatment to a person on conditional release, or any other person responsible for the supervision of the person, may take the person or request that the person be taken into custody if there is reasonable cause to believe the person's mental health has deteriorated to the point conditional release should be

revoked and the person is in need of immediate care, custody or treatment, or that deterioration is likely because of noncompliance with a treatment program. The person taken into custody must be transported immediately to a secure state mental health facility and has the same rights as any person appearing before the Board. A.R.S. § 13-3994(N).

Before the initial hearing or any other hearing before the Board on the release or conditional release of the person, the person, the attorney representing the person, and the attorney representing the State may choose a licensed psychiatrist or psychologist to examine the person. All costs for such examination must be approved and paid by the county of the sentencing court. The written examination results must be filed with the Board and include an opinion regarding (1) the mental condition of the person, and (2) whether the person is dangerous. A.R.S. § 13-3994(O). Notwithstanding A.R.S. § 13-3994(O), the Board or the chairman of the Board for good cause may order an independent mental health evaluation by a licensed psychiatrist or psychologist. The written examination results must be filed with the Board pursuant to subsection O. A.R.S. § 13-3994(P).

C. Guilty Except Insane Not a Criminal Conviction

Upon a determination that a defendant has committed a criminal act but is insane, the statutes permit the imposition of rehabilitative alternatives more humane than incarceration. The period of commitment under A.R.S. § 13-3994(A) serves the express purpose of treatment, not punishment. Moreover, treatment occurs under the jurisdiction of the department of health services, not the department of corrections. Thus, although

they share the feature of involuntariness, commitment and incarceration are not the same. *State v. Bomar*, 199 Ariz. 472, 476, ¶ 9 (App. 2001).

Those statutes provide for the commitment of persons found guilty except insane for the period a defendant could have received for the crime involved. If the criminal act involved the threat of death or serious physical injury to another, the person is placed under the jurisdiction of the psychiatric security review board for a period equal to that of the presumptive criminal sentence. The length of actual commitment, however, need not last as long as the analogous prison sentence. The law provides for hearings and potential early release; for example, A.R.S. § 13–3994(F)(2) provides that if the person proves by clear and convincing evidence that the person no longer suffers from a mental disease or defect and is not dangerous, the board must order the person's release. *State v. Bomar*, 199 Ariz. 472, 476, ¶ 10 (App. 2001). The period of commitment may also exceed the time provided by the sentencing statute. If the person is still suffering from a mental disease or defect when the time provided by the sentencing statute expires, the board may refer the person to the county attorney for civil commitment proceedings pursuant to A.R.S. § 13-3994(I). *Id*., ¶ 11.

The term of a commitment pursuant to A.R.S. § 13-3994 is thus uncertain: It could be less than the time provided by the sentencing statute or, if the State seeks a civil commitment near the end of the commitment term, it could be more. The need for treatment determines the length of commitment; commitment ends when the board finds the person no longer suffers from a mental disease or defect and is no longer dangerous. The statutory scheme thus reflects the legislature's intent that the length of

commitment terms relate to a person's rehabilitation. *State v. Bomar*, 199 Ariz. 472, 476-7, ¶ 12 (App. 2001).

i. Use as Prior Conviction; Restitution; Presentence Incarceration Credit

A.R.S. § 13-502(E) provides that a guilty except insane verdict is not a criminal conviction for sentencing enhancement purposes under § 13-703 or 13-704. Therefore, such a verdict may not be used to enhance a subsequent criminal conviction. *State v. Bomar*, 199 Ariz. 472, 475-76, ¶ 8 (App. 2001). Nor is a finding of guilty except insane a conviction for purposes of restitution. *State v. Heartfield*, 196 Ariz. 407, 408, ¶ 6 (App. 2000). The trial court thus lacks statutory authority to impose restitution after a defendant has been found guilty except insane. *Id*. 410, ¶ 10.

This also means the defendant is not entitled to credit for time served against a commitment to a mental health facility. A.RS. 13-709(B), governing pre-sentence incarceration credit, applies only to sentences of imprisonment resulting from a criminal conviction. A defendant cannot seek to reap the benefit of a conviction – entitlement to pre-sentence incarceration credit – but avoid the detriment – future sentencing enhancement, payment of restitution, and imprisonment. *State v. Bomar*, 199 Ariz. 472, 475-76, ¶¶ 7-8 (App. 2001). Further, because commitment serves a rehabilitative purpose unrelated to incarceration, it is not imprisonment. And because release from commitment depends upon recovery from the mental condition causing the commitment rather than merely serving a set number of days, a rational basis exists for not applying pre-sentence incarceration credit toward civil commitment. *Id*., 199 Ariz. at 479, ¶ 24.

See also State v. Cofield, 210 Ariz. 84, 86-87, ¶¶ 13, 14 (App. 2005)(detention as sexually violent person (SVP) is part of a separate civil proceeding, with a foundation, purpose, and structure that differs significantly from a criminal proceeding and thus credit for time served is not required); *compare* A.R.S § 13-606(B)(defendant civilly committed after imposition of sentence of imprisonment statutorily entitled to credit for time spent committed against term of imprisonment), *infra*.

VII. CIVIL COMMITMENT AFTER CRIMINAL CONVICTION

A.R.S. § 13-605(B) provides that if after the presentence investigation the court desires more detailed information about the defendant's mental condition, it may commit or refer the defendant to the custody of any diagnostic facility for a psychiatric evaluation for a maximum of 90 days; the facility must within that time return the defendant to the court with a diagnostic report and recommendations. If the court does not order diagnostic commitment under § 13-605(A), it must then either sentence the defendant pursuant to § 13-603 or invoke § 13-606.

A.R.S. § 13-606(A) provides that after a defendant is sentenced in accordance with A.R.S. § 13-603, if the court believes that the defendant discloses symptoms of mental disorder based on a report and recommendations under § 13-605(B), the court may proceed with civil commitment proceedings. A.R.S. § 13-606(B) provides that after termination of such commitment, the defendant must be returned to the court for release or to serve the unexpired term imposed under § 13-603. The period of confinement pursuant to the civil commitment must be credited to the sentence imposed. *Compare*, *State v. Bomar*, 199 Ariz. 472, 475-76, 477, ¶¶ 7-8, 14 (App. 2001) (defendant found guilty except insane not entitled to presentence incarceration credit).

VIII. INCOMPETENCE / INSANITY OF PERSON UNDER DEATH SENTENCE

The Eighth Amendment prohibits a state from executing insane prisoners, defined as "those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Ford v. Wainwright,* 477 U.S. 399, 422 (1986) (Powell, J., concurring). This is the applicable constitutional standard to which states must adhere. *Amaya-Ruiz v. Stewart*, 136 F. Supp. 2d 1014, 1021 (D. Ariz. 2001).

A person who is sentenced to death may not be executed as long as he is mentally incompetent to be executed. A.R.S. § 13-4021(A). "Mentally incompetent to be executed" means that due to a mental disease or defect a person who is sentenced to death is presently unaware that he is to be punished for the crime of murder or that he is unaware that the impending punishment for that crime is death. A.R.S. § 13-4021(B).

A. Procedure

The procedure for determining competency for execution is set forth in A.RS. § 13-4022. After the death sentence is imposed, the director of DOC, the prisoner's attorney or an attorney for the State may file a motion for competency evaluation in the county in which the prisoner is located explaining both the facts regarding the conviction and sentence and those giving rise to the belief that the prisoner may be mentally incompetent to be executed. A.RS. § 13-4022(A). However, only the Arizona Supreme Court may issue a stay of execution pending competency proceedings. A.RS. § 13-4022(B).

If the motion is timely (*see* Timeliness, *infra*) and presents reasonable grounds for examination, the superior court must appoint experts under Rule 11, Ariz. R. Crim. P. The expert's reports must be provided to all parties and indicate whether the prisoner

suffers from a mental disorder, illness, defect or disability such that the prisoner is incompetent to be executed and would benefit from restoration. A.RS. § 13-4022(C). The court may order physical, neurological, psychological or other examinations reasonably necessary to determine competency. A prisoner waives all privilege, and if the prisoner refuses to be examined by the state's mental health experts the court may not consider the prisoner's evidence. The evidence is not admissible at any proceeding to determine guilt or innocence, unless the defendant presents evidence intended to rebut the presumption of sanity or otherwise consents to admission of the evidence. A.RS. § 13-4022(D).

The court may hold a competency hearing after the examinations are completed. All parties may present evidence, cross-examine witnesses, and present argument, or by stipulation submit the matter on the basis of expert reports or other evidence. A.RS. § 13-4022(E). Prisoners who are sentenced to death are presumed competent to be executed. A prisoner may be found incompetent to be executed only on clear and convincing evidence of incompetency. A.RS. § 13-4022(F).

The court must state its findings on the record. If the court finds the prisoner is competent, the director of the DOC must execute the judgment. If the court finds the prisoner is incompetent, it must suspend the execution and immediately transmit a copy of its order to the Arizona Supreme Court. If the prisoner is incompetent, the court must determine whether the prisoner suffers from a mental disorder, illness, defect or disability and order competency restoration treatment. The prisoner must remain in DOC custody until the time for review has expired or review is completed. If no review is sought or the Arizona Supreme Court upholds the finding of incompetency, the DOC

director must transfer the prisoner to a licensed behavioral health or mental health inpatient treatment facility operated by DOC for restoration. The prisoner must remain confined in such facility until becoming competent to be executed. A.R.S. § 13-4022(G).

The department of health services must provide competency restoration treatment, including prescribing medication, to the prisoner. The treatment supervisor must submit a written report to the court, the attorney general, and the prisoner's attorney when the supervisor believes the prisoner is competent to be executed. The written report must include: the name of each mental health expert who examined the prisoner; a description of the nature, content, extent, and results of examinations and tests; and an opinion regarding competency. A.R.S. § 13-4022(H).

A party may file a petition for special action in the Arizona Supreme Court within 5 days after the superior court grants or denies a motion for examination or rules whether a prisoner is competent to be executed. A.R.S. § 13-4022(I). Finally, the superior court must certify the costs incurred by the county and forward the statement to the governor; the governor thereafter orders that the costs by paid by the country treasurer in the county in with the hearing was held from monies appropriate to DOC. A.R.S. § 13-4022(J).

B. Recovery of Competence

Within 60 days after a prisoner is committed for restoration, the chief medical officer of the state hospital must file a report setting forth the treatment being provided, the status of the prisoner, and a prognosis as to when the prisoner will be competent. The officer must provide copies of the report to all parties and to the Arizona Supreme Court, and update the report every 60 days until the prisoner is found competent. A.R.S.

§ 13-4023(A). After the prisoner is found competent, the officer must certify this finding to the Arizona Supreme Court. The Arizona Supreme Court must then order the execution be conducted according to the original warrant, if unexpired, or issue a new warrant appointing a time for execution of the judgment. . A.R.S. § 13-4023(B).

After a prisoner recovers competency and within 10 days after a warrant is issued, the superior court must appoint experts pursuant to Rule 11.3, Ariz. R. Crim. P., to assess the prisoner's competency to be executed. If the court believes there is a significant question about the prisoner's competency after considering the written opinions of the appointed experts, it must hold a competency hearing. If the parties agree, the court may determine competency without a hearing based on the submitted reports. A.R.S. § 13-4023(C). On the request of a party, the superior court may appoint experts after a prisoner's competency has been certified and before a warrant has been issued. A.R.S. § 13-4023(D). The prisoner may waive the appointment of experts pursuant to this section. A.R.S. § 13-4023(E).

Within 5 days after the court determines a prisoner's competency, a party may file a petition for special action in the Arizona Supreme Court to obtain review of the superior court's decision. A.R.S. § 13-4023(F). The costs incurred by the county in appointing experts under this section must be paid pursuant to § 13-4022(J). A.R.S. § 13-4023(G).

C. Timeliness

A motion for an examination that is filed fewer than 20 days before a scheduled execution is untimely and may not be considered by the court unless accompanied by both: (1) an affidavit from a licensed physician or licensed psychologist stating the

prisoner is not competent to be executed; and (2) a statement that establishes good cause for the failure to file the motion in a timely manner. A.R.S. § 4024(A). The motion must be served on DOC and the prosecutor.

The filing of an untimely motion constitutes consent by the prisoner to be evaluated by a mental health expert designated by DOC. The mental health expert must report the expert's findings to the superior court and the parties as expediently as practicable. If the prisoner fails to cooperate with an evaluation, the court must dismiss the motion. A.R.S. § 4024(B). If the court denies a motion for an examination under § 13-4022 or determines the prisoner is competent for execution, no further hearings on competency may be granted unless the successive motion is accompanied by an affidavit from a properly licensed physician or psychologist who has examined the prisoner and the affidavit shows a substantial change of circumstances and the showing is sufficient to raise a significant question about the prisoner's competency to be executed. A.R.S. § 4024(C).